

No. 12628

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SUNBEAM FURNITURE CORP., ARTHUR M. LUSTER, MEL-
VIN R. LUSTER and FRIEDA LUSTER, doing business as
SUNBEAM FURNITURE SALES CO.,

Appellant,

vs.

SUNBEAM CORPORATION,

Appellee.

APPEAL BY THE DEFENDANTS FROM A FINAL JUDGMENT
OF THE UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF CALIFORNIA, CENTRAL DIVISION, IN A
TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION
ACTION.

APPELLANT'S CLOSING BRIEF.

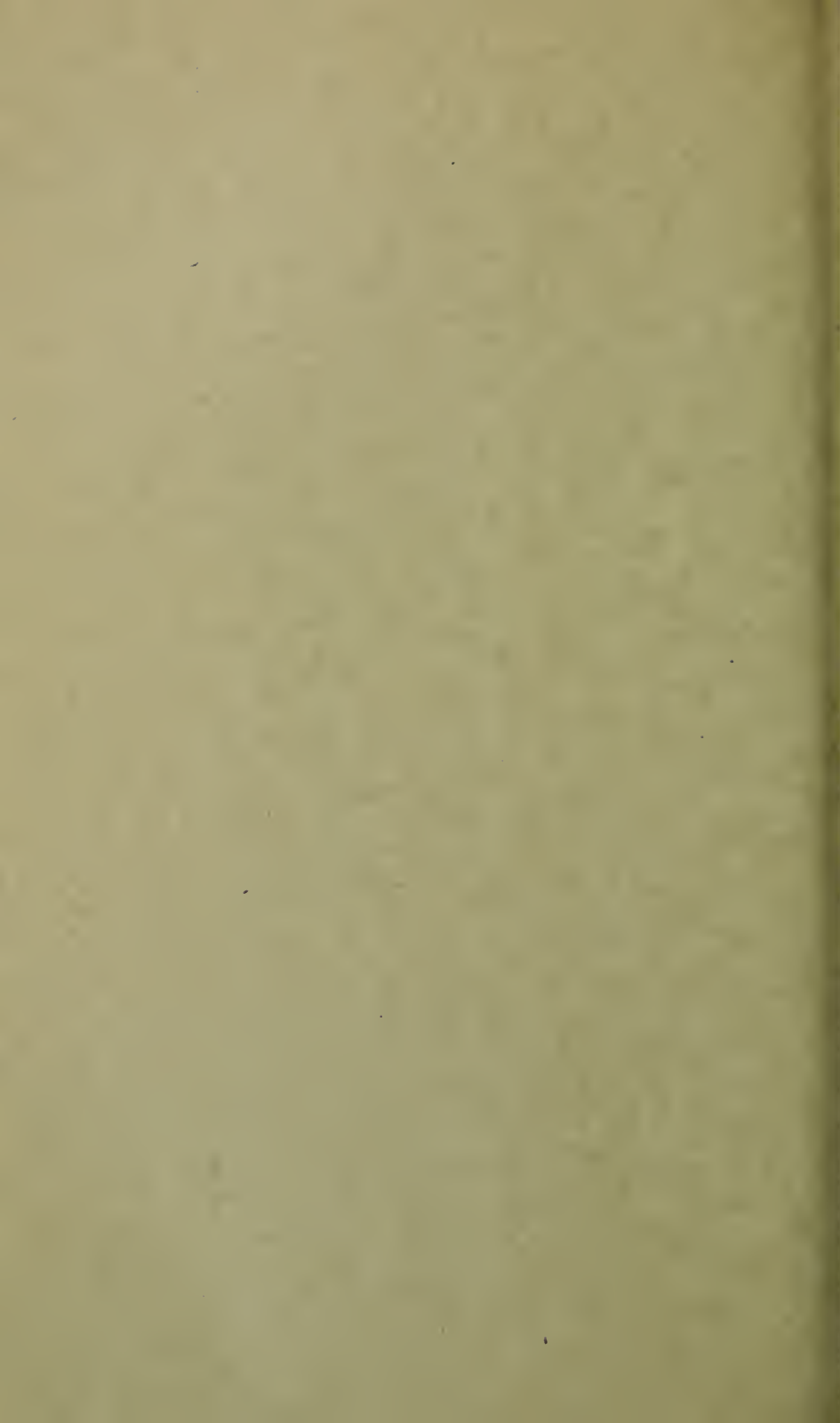
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APPELLANT'S CLOSING BRIEF.

Further Statement of the Case.

SUPPLEMENTAL AND CORRECTED FACTS.

It is believed that it will be helpful for this court in re-
viewing the facts and the law to have before it a condensa-
tion of certain significant dates. These are the dates of
first use of the trademark or tradename SUNBEAM, namely:

Plaintiff	1921 [R. 5]
Expert Lamps	1925-1930 [R. 215]
Defendant	1942 [R. 205]

Other dates:

Plaintiff changed corporate name from Chicago Flexible Shaft to Sunbeam Corporation	1946 [R. 107]
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First notice by plaintiff to defendant, this complaint filed	1948 [R. 11]
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From the foregoing factual summary of dates based upon the record of evidence it becomes apparent that Expert Lamps, Inc., used the trademark SUNBEAM in its own business for decorative lamps for at least eighteen years before plaintiff took any notice of it or took any action. Moreover, defendant here was using SUNBEAM as a part of its corporate name either as Sunbeam Furniture Sales Co. or Sunbeam Furniture Corp. for six years before plaintiff took sufficient notice to call defendant's attention to its position.

Summary of Argument in Reply.

I. Four Significant points:

- (a) Likelihood of confusion
- (b) Unfair competition
- (c) Trademark infringement
- (d) Secondary meaning

II. Plaintiff's authorities on question of infringement distinguished.

III. Plaintiff's cases in support of common law holding of trademark infringement and unfair competition are distinguished.

IV. To hold middlemen or distributors liable there must be something more than handling the trademark of another.

- (a) Pertinent sections of "Restatement"
- (b) Sections of "Restatement" relied on by plaintiff not pertinent
- (c) Plaintiff's authorities do not support middleman theory

V. Decision of *Sunbeam Lighting Co. et al. v. Sunbeam Corporation*, 183 F. 2d 969 supports defendant here; authorities are consistent.

VI. Plaintiff's public reaction test is the sole basis for charging defendant with liability.

- (a) Record of evidence
- (b) Plaintiff's authorities on question of reaction tests are unreliable

VII. The case against Expert Lamps, Inc.

VIII. Conclusion.

ARGUMENT IN REPLY.

I.

Four Significant Points.

Defendant's opening brief and plaintiff's answer thereto makes it apparent that the argument rests on four points:

(a) **LIKELIHOOD OF CONFUSION.** The entire question of infringement and unfair competition rests solely and completely on likelihood of confusion. The sole supporting evidence consists of the public opinion surveys.

There are but two questionable instances of actual confusion [R. 172, 325-326].

Evidence produced by both plaintiff's witnesses and defendant's witnesses clearly shows no likelihood of confusion.

Plaintiff's witness Garriot [R. 174-175]

Plaintiff's witness Sandstra [R. 186]

Plaintiff's witness Sahl [R. 392]

Plaintiff's witness Wallick [R. 181]

Plaintiff's witness Ives [R. 370-371]

Plaintiff's witness Still [R. 395]

Defendant's witness Wolfe [R. 195]

Defendant's witness Luster [R. 251]

Defendant's witness Ain [R. 263].

(b) **UNFAIR COMPETITION.** If there be any unfair competition it must be because defendant in its furniture business under the name Sunbeam Furniture Corp. distributes decorative lamps and shades as part of its line of furniture.

(c) **TRADEMARK INFRINGEMENT.** If there be any trademark infringement it must be because defendant

transships cartons of merchandise from Expert Lamps, Inc., upon which may possibly appear tags of Expert Lamps, Inc.

(d) SECONDARY MEANING. If plaintiff has established any secondary meaning it can mean nothing more than electrical appliances and cannot have reference to other electrical products wherever used. Consequently, SUNBEAM is not plaintiff's trademark. Its trademark is SUNBEAM FOR ELECTRICAL APPLIANCES.

II.

Plaintiff's Authorities on Question of Infringement Distinguished.

Plaintiff correctly cites the portion of the statute concerning the Trademark Act of 1946 treating with infringement. The sole pertinent portion of the statute is with regard to use "likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods."

Plaintiff's authorities relied upon to tie defendant's acts to the statute are clearly distinguished.

The Albert Dickinson Company v. Mellos Peanut Company of Illinois, Inc., 179 F. 2d 265, case relates to the term "Block Buster" for popcorn claimed to infringe "Big Buster" for popcorn. In this case the goods were *identical*. The case turned on the propriety of a summary judgment.

Coca-Cola Co. v. Snow Crest Beverages, Inc., 162 F. 2d 280, is concerned with "Polar-Cola" held not to infringe "Coca-Cola". No unfair competition was found. The goods were *identical*. The names sound alike. Only their appearance was different.

In *William R. Warner & Co. v. Eli Lilly & Co.*, 265 U. S. 526, the question involved the sale of a later *identical* product at a much cheaper price by the same persons who sold a prior product which had acquired a large market. An injunction was issued solely to prevent the sale of the later product at a cheaper price.

III.

Plaintiff's Cases in Support of a Common Law Holding of Trademark Infringement and Unfair Competition Are Distinguished.

The California cases clearly do not support plaintiff's interpretation of them.

In *Winfeld v. Charles*, 77 Cal. App. 2d 64, the defendant deliberately changed his name from Charles to Winfield and then moved his manufacturing business to a location within sight of plaintiff's manufacturing business. The defendant thereby placed himself in a position to trade upon plaintiff's reputation. Even in this case the court said:

"No inflexible rule of law can be laid down as to what conduct will constitute unfair competition . . .
Unfair competition is a question of fact . . ."

Academy of Motion Picture Arts and Sciences v. Benson, 15 Cal. 2d 685, did not treat with trademark infringement but instead turned upon unfair competition. The test was as to whether the unfair practices of the defendant who changed her name to "The Hollywood Motion Picture Academy" would injure the originators of the term "Academy Award."

The cases *Stork Restaurant v. Sahati*; *Lane Bryant, Inc. v. Maternity Lane Limited of California*; *Brooks*

Bros. v. Brooks Clothing of California Limited; and *Horlick's Malted Milk Corporation v. Horluck's, Inc.*, have already been distinguished in defendant's opening brief.

The case of *LaTouraine Coffee Co., Inc. v. Lorraine Coffee Company, Inc., et al.*, 157 F. 2d 115, appearing in plaintiff's brief, footnote 3, again was concerned with *identical* products, namely, coffee. In addition the trademarks selected had the same sound and eye appearance.

IV.

**To Hold Middle-men or Distributors Liable There
Must Be Something More Than Handling the
Trademark of Another.**

Plaintiff, faced with a scarcity of settled law on this question, has resorted to bald abstract statements from "American Law Institute Restatement of the Law of Torts."

The "Restatement," while academically correct, is no more a criterion of infringement than a similar bald statement selected from a recognized authority where the facts involved are different. The Restatement is even less dependable because it does not treat with real issues of fact but only supposititious circumstances.

Plaintiff seems misled into assuming that because there may be unfair competition without market competition, other tests may be disregarded. Unless there is clear proof of a trespass neither language of the "Restatement" nor decided cases is of consequence.

In referring to the "Restatement" other pertinent passages should be considered in addition to those selected and quoted by plaintiff. Plaintiff adapted *SUNBEAM* as a *tradename* long after defendant entered its own

field. Consequently the broader significance attaching to a tradename does not apply here. These passages of the "Restatement" are felt to be pertinent and significant:

(a) Pertinent Sections of "Restatement."

"Section 717(d).

LIMITATION AS TO GOODS AND MARKET. One who has a trademark or tradename does not have the exclusive right to use the designation even as a trademark or tradename. He has that exclusive right only within more or less restricted markets and with reference to more or less restricted kinds of goods, services or business.

"(f) PRIORITY IN TRADENAMES IS NOT OF THE SAME SIGNIFICANCE AS IN TRADEMARKS. A designation is a tradename only if, apart from other requirements, it has acquired a special significance as the name of the goods, services or business of one person.

"Section 730(b).

* * * * *

The issue in each case is whether the goods, services or businesses of the actor and of the other are sufficiently related so that the alleged infringement would subject the good will and reputation of the other's trademark or tradename to the hazards of the actor's business. * * *

"Section 733(b).

FAILURE TO PREVENT SUBSEQUENT USE BY OTHERS. Failure by a prior user of a trademark or tradename to take effective steps to prevent subsequent use of a similar designation by another may narrow the class of goods or the territorial markets with reference to which his priority would otherwise entitle him to exclude others."

(b) Sections of "Restatement" Relied on by Plaintiff Not Pertinent.

Plaintiff's quoted selections from the "Restatement" are not applicable to the facts here in issue. Infringement in different stages of distribution does not relate to use by one of the trademark of someone else. The same comment applies to infringement in a different stage of the marketing process. In the last instance the difference in the class of persons who purchase the goods is a factor when considering issues of confusing similarity.

(c) Plaintiff's Authorities Do Not Support Middle-man Theory.

Among plaintiff's cited authorities is *American Philatelic Society v. Claibourne*, 3 Cal. 2d 689, wherein the products, stamps, were in fact *illegally* perforated to make them look like expensive genuine items. Those illegally constituted items were then offered to unscrupulous dealers. Judgment was predicated on simulation and imitation of *identical* goods for the very purpose of deceiving the unwary public.

Enoch Morgan's Sons Co. v. Whittier-Coburn Co., 118 Fed. 657, treated with soap wherein the size, color and shape of the infringing package copied so closely plaintiff's package that the infringing label on *identical* goods was considered a counterfeit.

Federal Trade Commission v. Winsted Hosiery Co., 258 U. S. 483, turned upon the question of *flagrant misbranding* wool to suggest it being pure wool which it was not. The court held that to be unfair to those who marked similar goods honestly. This was a case of outright fraud deliberately practiced on *identical* goods.

In the case of *Saratoga Vichy Spring Co. v. Saratoga Carlsbad Corporation, et al.*, 45 Fed. Supp. 260, the facts showed defendant's labels actually simulating plaintiff's labels in form, arrangement, color and style of printing for *identical* goods. Flagrant copying was considered to obviate lack of proof of confusion.

In *Saxlehner v. Siegel-Cooper Company*, 179 U. S. 42 *identical* products were involved, namely, water. Defendants actually palmed off the infringing water as plaintiff's product. Labels so closely simulated plaintiff's labels as to make it possible.

In *Frischer & Co., Inc., et al. v. Bakelite Corporation, et al.*, 39 F. 2d 247, goods again were *identical*. What importers failed to do was to so distinctively mark imported goods that they could not be passed off by subsequent purchasers as the well-known domestic goods.

In *Chesebrough Mfg. Co. v. Old Gold Chemical Co.*, 70 F. 2d 383, the products were *identical*, namely, petroleum jelly, sold in transparent jars. The infringer's carton was substantially the same size, shape and color. The deceptive appearance was obvious. Several retailers openly sold one instead of the other.

In *F. W. Fitch Co. v. Camille, Inc.*, 106 F. 2d 635, the goods were *identical*. They were packaged alike. Defendant's display cards simulated those of the plaintiff and infringer's trademark "Stop-A-Run" closely resembled plaintiffs' trademark "Run-R-Stop." Flagrant copying

enabled the liability to be passed from the actor to the instigator.

Grocers Banking Co. v. Sigler, 132 F. 2d 498, concerned *identical* products, namely, bread, and identical tradenames such as "Hun-E-Krust" or "Honey-Krust" where even the design on the wrapper was copied and passing off was proven.

My-T Fine Corporation v. Samuels, 69 F. 2d 76, involved *identical* products, namely, pudding. Defendant's box was the same size and a virtual copy in design and color of plaintiff's box. Flagrant copying was the deciding factor.

Cases relied upon by the plaintiff to support liability of the middle-man evidence in every instance some flagrant or glaring breach of the common principles of decency and honesty relating in almost every instance to *identical products*.

The parties in the case at bar are two entirely separate and distinct businesses going their own way, using their own marks and not one real instance of actual confusion has been shown. The market appeal of the products is entirely different. The goods are entirely foreign to each other. They are linked only by a vague reference to electricity.

Defendant should not be enjoined from using SUN-BEAM in the FURNITURE BUSINESS because decorative lamps are wired for electricity.

V.

Decision in Sunbeam Lighting Co., et al. v. Sunbeam Corporation, 183 F. 2d 969, Supports Defendant Here; Authorities Are Consistent.

Plaintiff refers to a subordinate portion of the opinion of this court where it refers to "the portable lamps and the way they are marketed (which) puts the latter on sale in such a way as to cause confusion." Plaintiff makes no mention of how those portable lamps were sold. How lamps are sold has as much bearing in the case at bar as it did in the other case where fluorescent lighting fixtures were sold in a manner different from the way plaintiff sold its appliances.

The furniture items comprising decorative table lamps here charged to infringe are sold in a fashion even further afield from the sale of plaintiff's appliances. The lamps are sold solely on eye appeal and because they need to match other household furniture and draperies, etc. They are not sold on electrical performance.

Plaintiff's authorities are only of a general character involving factual issues unrelated to the facts of the case at bar. Defendant's entire business is a wholesaling business. Its witnesses at trial were plaintiff's witnesses as well as its own. The testimony of both were in full support of defendant's position. It was unnecessary to crowd the record with a repetition of clear-cut facts by further witnesses of defendant's special selection.

When plaintiff relies upon *Wall v. Rolls-Royce of America, Inc.*, 4 F. 2d 333, again the facts show that the defendant in that case deceptively used only the name Rolls-Royce Tube Co. without identifying himself. De-

defendant misrepresented his address as "Department A, Rolls-Royce Tube Co."

In *Standard Brands, Inc. v. Smidler*, 151 F. 2d 34, an arbitrary and *fanciful* mark, namely, "V-8," was in issue, not a common mark such as SUNBEAM.

In *Radio Shack Corporation v. Radio Shack, Inc.*, 180 F. 2d 200, the corporations were in direct competition selling *identical* products. The wrong lay in realization by the defendant on plaintiff's reputation.

In *Triangle Publications, Inc. v. Rohrlich, et al.*, 167 F. 2d 969, an arbitrary and distinctive trademark was involved, namely, "Seventeen" for a magazine, extensively advertising young ladies' wear including girdles. The defendant then selected the same *fanciful* mark changed to "Miss Seventeen" for use on girdles and foundations of the same sort advertised in the magazine.

VI.

Plaintiff's Public Reaction Test Is the Sole Basis for Charging Defendants With Liability.

(a) Record of Evidence.

The reaction test is completely misleading.

Both consumer reaction tests relied upon by plaintiff were conducted under precisely the same circumstances and with the same set of questions. The fact that the results of the second were similar to the first proved only that the tests were consistent with each other. Had plaintiff honestly sought a true picture plaintiff could have presented a different test for a second test. Had a different test been tried, the results may have been quite at variance.

Plaintiff in its brief says of its tests, "It submits that a more reliable presentation of the facts in issue here could not possibly be devised." Defendant suggests that a more honest survey could have been presented had plaintiff tested the reactions of lamp buyers in stores where lamps are bought. That would have been a real and reliable test.

The unfairness of the test is revealed by Mr. Lampa under cross-examination:

"Q. Mr. Lampa, among the 1,500 interviews which you reported upon, not one of those persons was shown an actual lamp, were they? A. No, sir.

Q. Not one of those persons was shown one of the labels which was attached to the lamp that you took a photograph of? A. No, sir.

* * * * *

Q. Can you tell me, Mr. Lampa, what prompts you to show a photograph of a lamp, such as this (indicating), and to leave out of the picture all environment? Why do you just show the lamp by itself? A. Why did I show it all by itself?

Q. Yes. A. I thought it would be clearer and less confusing to the person being interviewed. *If you had other objects in there, their eyes might wander or their minds might wander.*" (Emphasis ours.)

From this it is obvious that the survey was one engineered to produce a result other than the result which would have been produced under circumstances wherein the goods are normally sold.

(b) Plaintiff's Authorities on the Question of Reaction Tests
Are Unreliable.

The case of *S. C. Johnson & Son v. Johnson*, 28 Fed. Supp. 744, was one wherein inquiries were made by *prospective purchasers* and not by canvassers in a field foreign to the market place. In that case the names were identical and the products substantially so.

In *Tillman & Bendel v. California Packing Corp.*, 63 F. 2d 498, "Del Monte" for fruits and vegetables was infringed by "Del Monte" for coffee. The survey showed that persons who "*when they purchased* defendant's coffee thought it was a product of the same concern that packed Del Monte fruits and Del Monte vegetables." (Emphasis ours.) Moreover, the survey was abundantly supported by proof of *actual confusion*.

In *Oneida, Ltd. v. National Silver Co.*, 25 N. Y. S. 2d 271, *identical* products, namely, silverware, were involved and the pattern simulated. The survey conducted by college girls was one wherein the girls pretended to be *shoppers or purchasers* and actually tested sale of the goods where the goods were ordinarily sold.

Had plaintiff here chosen a *purchaser* survey the evidence would have been significant and doubtless different.

VII.

The Case Against Expert Lamps, Inc.

For at least the past quarter century plaintiff, Chicago Flexible Shaft, subsequently the Sunbeam Corporation, resided in Chicago where also Expert Lamps, Inc., had its place of business. Both companies used the trademark SUNBEAM throughout substantially that period. Plaintiff

used the mark on electric appliances; Expert Lamps, Inc. used the mark on decorative lamps [R. 255]. In all of that time plaintiff apparently did not experience sufficient evidence of confusion to warrant taking any notice of Expert Lamps.

Plaintiff with the tribunals of the United States District Court in Chicago available to it in 1948 elected not to pursue what rights it may have supposed it had against Expert Lamps in Chicago but instead selected the District Court for the Southern District of California in which to bring its action. In its complaint, filed October 5, 1948, it attempted to join Expert Lamps, Inc. with defendants here in litigation. That litigation against Expert Lamps was terminated by court order after a motion duly brought to quash service on Expert Lamps because the court had no jurisdiction over it.

Nevertheless plaintiff has persisted in presenting evidence and proofs of the fact that it is use of the tag of Expert Lamps carrying the trademark SUNBEAM for decorative table lamps which constitutes the acts of infringement herein charged against the defendant Sunbeam Furniture Corporation.

Expert Lamps, Inc. has not had its day in court. In the trial of this case when defendant sought to introduce evidence of contemporaneous use of the trademark SUNBEAM by Expert Lamps, the trial judge sought to discourage and exclude it. The following excerpt from the record is significant [R. 252-255]:

“Q. How long have you known the Expert Lamp Company? A. All of my life.

Q. Would you say about how many years you have known them as a manufacturing company? A. I

don't really know when the Expert Lamp Company went into business.

The Court: You are creating an issue that isn't created by the pleadings. The motion to quash the summons against the Expert Lamp Company was sustained, and they are not before the court. I can't see why you are creating an issue.

Mr. Beehler: We have been charged with trademark infringement. The Sunbeam Furniture Corporation has no trademark. The only trademark on any goods which the Sunbeam Furniture Corporation merchandises in any way whatsoever is the Sunbeam trademark of the Expert Lamp Company."

* * * * *

Mr. Beehler: There was an abundance of testimony, your Honor, introduced here yesterday by the plaintiff purporting to show that we, as defendants, because we handled the Expert Lamp Company lamps are infringers.

The Court: I am not passing upon that question. I am passing upon the materiality of the testimony you are eliciting from this witness, which bears upon the status of a company which is not a party to this action. I am not objecting to any questioning relating to the dealings between him and the company. We can't make a finding that would affect the Expert Lamp Company.

* * * * *

The Court: . . . We are not trying the Expert Lamp Company. If they have a case against them, it is up to the plaintiff to start it in the proper jurisdiction. Go ahead. Let's hear the last question.

Mr. Beehler: I will risk one more question.

The Court: There is a question unanswered, I think.

(The last question and answer thereto were read by the reporter.)

The Court: He doesn't know. That is another reason why this inquiry is not proper. Go ahead.

Mr. Beehler: I would like to risk this question if you don't mind.

Q. (By Mr. Beehler): *How long has the Expert Lamp Company used the name 'Sunbeam' for lamps?*

The Court: To your knowledge. You never were connected with them in any capacity, were you?

The Witness: No.

The Court: All right.

The Witness: *To the best of knowledge for the last 20 to 25 years.*" (Emphasis ours.)

Nevertheless after taking this attitude when defendants sought to present evidence, the court took a different attitude when plaintiff sought to introduce the deposition of Arthur M. Luster taken in Chicago. During that deposition counsel for defendants objected to all questions propounded to Arthur M. Luster where those questions related to the activity of Expert Lamps, Inc. When that deposition was presented before the trial court defendant's counsel repeated the objections. The reading of the deposition ran much as follows [R. 272-275]:

"Mr. Pattishall: Will you give me the names and addresses of the officers of Expert Lamps, Inc.?"

Mr. Beehler: I raise objection.

The Court: The objection is overruled.

Mr. Christophersen: 'Arthur M. Luster, 3172 Sheridan Road.'

Mr. Pattishall: What office?

Mr. Christophersen: President. Frieda Luster, same address, Secretary. Mort R. Luster, Vice President and Director.

Mr. Beehler: Let me state for the record that it is understood that with respect to any of the questions dealing with Expert Lamps, I am making one objection to the entire line without the necessity of repeating them, although in some instances I will instruct the witness not to answer specific questions.

Mr. Pattishall: That is understood.

The Court: All right. Go ahead.

Mr. Pattishall: Could you give us Mr. Mort Luster's address, please?

Mr. Christophersen: 6428 North Francisco, Chicago, Illinois—

The Court: I will overrule the objection. I will state now, while we are at it, we will complete the entire deposition, because you may want to have a comment to make upon the testimony brought out here, so it will be more intelligible to me than it was before, before I read it.

* * * * *

Mr. Beehler: I object to that and instruct the witness not to answer.

The Court: Did he answer?

Mr. Pattishall: He didn't answer.

Mr. Beehler: He didn't answer.

The Court: If he were here I would make him answer. I cannot make him answer, though."

From the foregoing it is clear that all questions and answers with regard to Expert Lamps, Inc. appearing in the deposition should be stricken. The injunction in this case strikes at the defendant through Expert Lamps, Inc.

in a manner and under circumstances wherein defendant could not offer a defense. The character of the decision is such that the defendant here is made to suffer from the unproven charges against Expert Lamps, Inc.

Even where plaintiff has sought to show that Expert lamps are on sale bearing Expert's trademark SUNBEAM plaintiff has not proved that those lamps reached their destination through the defendant. Plaintiff has not shown that defendant is the sole distributor and source of Expert lamps in southern California. Defendant is not the only outlet here for Expert lamps.

"The Court: Are you the only outlet they have between Chicago and here?

The Witness: No." [R. 258.]

The defendant here is charged with a burden arising from an unproven case against Expert Lamps, Inc., under circumstances where no defense could be offered.

VIII.

Conclusion.

All of the facts and circumstances therefore clearly indicate no liability whatsoever or of any kind by defendant here whether in connection with a charge of trademark infringement or unfair competition.

Respectfully submitted,

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